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Supreme Court, U.S.
FILED

08-338 AUG 21 2008

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In The Supreme Court of the United States

October Term, 2008

Case No. _____

DIANA LEE FLAHERTY,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF QUESTION PRESENTED

Whether the exclusion of state of mind evidence pursuant to Federal Rule of Evidence 803(3) violates the foundational principles of our system of justice grounded in the Fifth and Sixth Amendments to the Constitution that a Defendant has a right to present a defense to the charged offenses and has the right to present evidence and testimony favorable to her defense.

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Case No. _____

DIANA LEE FLAHERTY, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Anthony P. Capozzi, on behalf of Petitioner, Diana Lee Flaherty, respectfully petitions for a Writ of Certiorari to review the Judgment to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit[1] was rendered on March 20, 2008 and the Petition for Rehearing was denied on May 23, 2008.

JURISDICTION

The United States District Court for the Las Vegas District of Nevada had jurisdiction pursuant to Title 18, United States Code Section 3231.

The Court of Appeals for the Ninth Circuit had jurisdiction pursuant to Title 28, United States Code Section 1291. The Opinion of the Court of Appeals was filed on March 20, 2008. The Petition for Rehearing was denied on May 23, 2008.

The jurisdiction of this court is invoked under Title 28, United States Code Section 1254(1).

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[1] All further references to the United States Court of Appeals for the Ninth Circuit will be abbreviated as "Court of Appeals".

BAIL STATUS

The Petitioner has been incarcerated at the Federal Correctional Institute in Dublin, California since September 25, 2007. Her expected release date is January 5, 2014.

STATEMENT OF THE CASE

On March 2, 2004, a Federal Grand Jury in the District of Nevada returned a criminal Indictment against Petitioner, Diana Lee Flaherty. On April 20, 2005, a Superseding Indictment was filed. On November 15, 2005 a Second Superseding Indictment was filed charging the Petitioner with Conspiracy to Commit Securities Fraud, a violation of Title 18, United States Code Section 785(b); Mail Fraud and Wire Fraud, a violation of Title 18, United States Code Sections 1341 and 1343, all in violation of Title 18, United States Code Section 371; Securities Fraud, a violation of Title 15, United State Code Section 78j(b); Conspiracy to Commit Money Laundering, a violation of Title 18, United States Code Section 1957.

A verdict was returned on May 4, 2006 finding the Petitioner guilty on all counts. The Petitioner

was remanded into custody and later released on a property bond.

On December 11, 2006, the District Court denied the Petitioner's Motion for New Trial. On February 12, 2007 the Petitioner was sentenced to 90 months and an Order of forfeiture was entered.

On February 20, 2007, the Notice of Appeal was filed. On February 23, 2007 the Judgment was entered.

On March 20, 2007 the Order denying the Motion for New Trial was filed.

The Opinion of the Court of Appeals for the Ninth Circuit was filed on March 20, 2008. The Petition for Rehearing was denied on May 23, 2008.

The Mandate of the Court of Appeals for the Ninth Circuit was entered on May 30, 2008.

STATEMENT OF FACTS

The Government sought to prove the allegations by attempting to establish that the Petitioner and her late husband, Robert Flaherty, convinced potential investors into believing that appreciable amounts of gold and other precious

metals were contained in volcanic cinders; that they possessed the technology to extract gold and other precious metals; that they had large deposits of such volcanic cinders, containing billions of dollars worth of precious metals and that the production of precious metals had begun or was imminent.

The Petitioner's defense was that she lacked the necessary intent to defraud in that Mrs. Flaherty, a lay person with no prior metallurgical experience, had a good faith belief that there was a measurable and economically viable quantity of precious metals in volcanic cinders and that Phoenix Metals was close to being able to commercially extract those metals.

The parties agreed to the following Statement of the Case:

> "Gold and platinum group metals (comprised of platinum, palladium, rhodium, iridium, osmium, and ruthenium) are naturally occurring elements. These metals are considered "precious metals" and are highly valued because of the difficulty of economically extracting them from most low-concentration sources.
>
> Arizona and other southwestern states are dotted with remnants of ancient

volcanoes. Volcanic cinders are the most readily recognized volcanoes. These conical shaped peaks are actually mounds of basaltic scoria (often referred to as "lava rock" or "cinders") that formed when blobs and ribbons of molten lava were ejected from the volcano and solidified – trapping bubbles or pockets of gas inside – before landing on the ground.

This case involves government allegations that Robert F. Flaherty, who is deceased, Diana Lee Flaherty and Michael Gardiner engaged in a scheme to defraud investors by making, or causing to be made certain representations they or corporations they controlled possessed proprietary technology and processes that enabled them to economically and profitably extract vast quantities of gold from volcanic cinder cones. The government also alleges that the defendant and her associates falsely represented that production of precious metals had begun or was imminent, and that they owned specific cinder deposits and other assets. By doing so, the government claims that the Defendant, Diana Lee Flaherty, committed securities fraud and participated in conspiracies to commit securities fraud, mail fraud, wire fraud, and money laundering."

The Petitioner, Diana Lee Flaherty, along with her late husband Robert Flaherty, were the principals of Phoenix Metals. Co-defendant Michael Gardiner worked closely with the Flaherty's and assisted in their capital raising efforts. The Petitioner reviewed and discussed Assay Reports 501, 509, 510 and 512 with Mr. Gardiner. Petitioner told Mr. Gardiner that before she made the decision to get involved in Phoenix Metals, she wanted to ensure that there were precious metals in the cinders and that those metals could be processed. To that end, the Petitioner personally collected samples of the company's cinders and submitted them for analysis. The Petitioner emphasized to Mr. Gardiner that she had personally collected the samples, so she knew that they came from the company's volcanic cinders.

Gardiner identified Exhibits 509 and 510 as Assay Reports that he saw while at Phoenix Metals which established gold and precious metals in the company's volcanic cinders. He discussed Exhibits 509 and 510 with the Petitioner. Over the Government's objection, the Court allowed Exhibits 509 and 510 into evidence as a state of mind

exception to the hearsay rule pursuant to Federal Rule of Evidence 803(3) since the assays went to the Petitioner's state of mind that there were precious metals in the volcanic cinders.

Gardiner also identified Exhibits 501 and 512, both of which contained numerous Assay Reports which were completed by Phoenix Metals while he was working with the company. These reports established that precious metals existed in the volcanic cinders.

As with Exhibits 509 and 510, Gardiner reviewed and discussed the Assay Reports in Exhibit 501 and 512 with the Petitioner. The District Court, however, refused to admit Exhibit 501 and 512 into evidence on the basis of hearsay.

Gardiner's testimony was clear that both he and the Petitioner discussed the fact that the Petitioner personally took cinder samples from the company's cinders and had them assayed. The Assay Reports, Exhibits 501, 509, 510, and 512, demonstrated that there were precious metals in the volcanic cinders.

The Court of Appeals for the Ninth Circuit held that foundation had not been established to

show that the Petitioner believed, in good faith, that the Assay Reports were based on unadulterated cinder samples. (Federal Rule of Evidence 901(a)) Without such evidence, the reports could not establish her good-faith belief that the cinders contained precious metals. Thus the District Court did not abuse its discretion by excluding the reports.

The Appellate Court erred in upholding the District Court decision not to admit Exhibits 501 and 512 even though the basis for admission was on the same basis as Exhibit 509 and 510, i.e. the state of mind exception to the hearsay rule, Pursuant to Rule 803(3) of the Federal Rules of Evidence.

ARGUMENT

The Exclusion of State of Mind Evidence Pursuant to Federal Rule of Evidence 803(3) Violated Petitioner's Right to Present A Defense to the Charged Offenses And Her Right to Present Evidence And Testimony Favorable to Her Defense.

Exhibits 501 and 512 were offered into evidence for a non-hearsay purpose, i.e. to establish that the Petitioner had a good faith belief that there was a measurable and viable quantity of precious

metals in the volcanic cinders and lacked the necessary intent to defraud.

Admission of the Assay Reports were for a non-hearsay purpose, i.e. state of mind, Exhibits 509 and 510 were allowed into evidence, but not 501 and 512 even though the foundation and basis for admission were identical.

Any foundational evidence pursuant to Federal Rule of Evidence 901(a) would go to the weight of the evidence not to its admissibility when the issue at hand is the state of mind exception to the hearsay rule, Federal Rule of Evidence 803(3).

In Schering Corp. v. Pfizer, Inc., 189 F.3d 218 (2nd Cir. 1999) Schering attempted to introduce various surveys conducted to establish the state of mind of various doctors who had been contacted by a sales agent of Pfizer, Inc. The question was whether or not doctors had been misled as to side effects of certain medications. Pfizer objected on the basis of hearsay and attacked the methodology of the survey, i.e. the foundation. The Schering Corp. case (189 F.3d 226) cited a number of cases which indicate that technical or methodological deficiencies in surveys relate to the weight to be given to the evidence, not

to its admissibility. The Schering case ultimately stated that evidence of the state of mind of persons surveyed is not inadmissible as hearsay. (189 F.3d 228, 238)

The rationale in United States v. Moran, 493 F.3d 1002 (9th Cir. 2007) clearly demonstrated the error committed by the District Court and the Ninth Circuit Court of Appeals in rejecting the Petitioner's evidence regarding the state of mind exception to the hearsay rule.

The crucial issue in Moran, supra, was the District Court's exclusion of Mrs. Moran's testimony regarding the information and advice she received from the experts about the legality of the tax scheme for which she was being charged.

Moran argued that by excluding Mrs. Moran's testimony about advice she received from outside financial and legal experts, the District Court committed reversible error. Mrs. Moran's principal defense was that she held a good faith belief that the tax programs in which she participated where legal. She contended that her belief was based, among other things, on opinions from a CPA and outside experts. The District Court sustained objections to

her testimony about what she had been told on grounds of hearsay and Rule 403. (493 F.3d 1011)

On two occasions during the trial, the District Court excluded testimony by Mrs. Moran about what she had learned from outside experts.

The Moran court clarified that the burden is on the Government to negate the defendant's claim that he had a good faith belief that she was not in violation of the tax law and that good faith reliance on a qualified tax accountant has long been a defense to willfulness in cases of tax fraud. (493 F.3d 1013)

The court went on to state:

> "Not only is testimony about the reliance on qualified experts relevant to establishing this defense, but the defendant 'has the right to tell the court his own version of the tax advice on which he claim[s] to have relied.' Such testimony does not constitute hearsay when not offered for the truth of the matter stated. Because there is an intent element in fraud cases, good faith belief in legality also provides a defense to the fraud counts." (Citations omitted) (493 F.3d 1013)

This exclusion undermined Mrs. Moran's good faith defense. The Moran court held:

> "To the extent the court excluded the disputed testimony from Mrs. Moran's redirect as hearsay, it was error since the testimony was not offered for the truth of the matter asserted and thus its exclusion was an abuse of discretion." (Citations omitted) (493 F.3d 1013)

Similar to Mrs. Moran's case, the focal point of the Petitioner's defense was her good faith belief that volcanic cinders contained measurable quantities of precious metals. The Petitioner was not permitted to introduce critical evidence (Exhibits 501 and 512) which were the numerous, independently produced Assay Reports establishing precious metals in volcanic cinders that she had reviewed and discussed with government witness, co-conspirator, Michael Gardiner.

The Petitioner was not allowed to establish her reliance on the Assay Reports which established her state of mind and good faith belief that there were measurable quantities of precious metals in the volcanic cinders.

As in Moran, supra, to the extent the court excluded the assay reports (Exhibits 501 and 512) as hearsay, it was error since the exhibits were not

offered for the truth of the matter asserted, but rather to establish the Petitioner's state of mind and good faith defense pursuant to Rule 803(3) of Federal Rules of Evidence.

Testimony that is admissible under the Rules of Evidence is not transformed into inadmissible testimony merely because the party opponent has only cross-examination to attack its accuracy. Nor is non-hearsay transformed into hearsay merely because jurors may infer the truth of the matters that are not offered for the truth of the assertion. Were that the rule, there would be precious few, if any, exceptions to the hearsay rule as the same problem exists with almost any excited utterance or state of mind testimony. In fact, the problem is endemic in the nature of hearsay and its exceptions and is present whenever a court instructs a jury not to accept an out of court statement for the truth of the matter but for the limited purpose of the applicable exception to the hearsay rule. The District Court gave a limiting instruction to the jury with regard to the state of mind exception to Exhibits 509 and 510 to explain the state of mind exception to

the hearsay rule. The same could and should have been done for the critical Exhibits 501 and 512.

The exclusion of these assays, Exhibits 501 and 512, violated the foundational principles of our system of justice, grounded in the Fifth and Sixth Amendments of the Constitution: that the defendant has the right to present a defense to the charged offenses, and that the defendant has the right to present evidence and testimony favorable to her defense. While the trial court has broad discretion to determine whether evidence is relevant, that discretion "is limited by the [defendant's] due process right to present a defense and her Sixth Amendment right of confrontation" United States v. Whitman, 771 F.2d 1348, 1350 (9th Cir. 1985).

CONCLUSION

It is respectfully requested that this honorable court grant the Petition for Writ of Certiorari.

Dated: August 20, 2008

Respectfully submitted,

LAW OFFICES OF ANTHONY P. CAPOZZI

Anthony P Capozzi

ANTHONY P. CAPOZZI
Attorney for Petitioner
DIANA LEE FLAHERTY

105

Supreme Court, U.S.
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In The Supreme Court of the United States

Case No. _____

DIANA LEE FLAHERTY,

PETITIONER,

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UNITED STATES OF AMERICA,

RESPONDENT.

PETITIONER'S APPENDIX

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2. Order denying Appellant's Petition for Rehearing, filed May 23, 2008.

1.

Opinion from Court of Appeals
for the Ninth Circuit, regarding
United States v. Diana Lee Flaherty,
Case No. 07-10138
filed March 20, 2008.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
DIANA LEE FLAHERTY,	)
	)
Defendant-Appellant.	)
	)

MEMORANDUM*

NO. 07-10138
D.C. No. CR-04-00084-RCJ/RJJ

Appeal from the United States District Court
For the District of Nevada
Robert C. Jones, District Judge, Presiding

Argued and Submitted February 27, 2008
Las Vegas, Nevada

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: HAWKINS, **BERZON, and BYBEE, Circuit Judges.

Defendant offered no foundational evidence to show that she believed, in good faith, that the assay reports were based on unadulterated cinder samples. Fed.R.Evid. 901(a). Without such evidence, the reports could not establish that the cinders contained precious metals. Thus, the district court did not abuse its discretion by excluding the reports.

The district court's failure to instruct the jury that the government had the burden to disprove defendant's good faith was not plain error, because the jury was specifically instructed the government had to prove defendant's specific intent to defraud. See United States v. Shipsey, 363 F.3d 962, 967-68 (9th Cir. 2004). Because the jury was also told that a belief can be held in good faith even if "inaccurate, incorrect, or wrong," it was not plain error to fail to further instruct that a belief can be held in good faith even if not objectively reasonable.

** After argument, Chief Judge Kozinski recused himself from participation in this case. Judge Hawkins was drawn in his place, has listened to the arguments, and considered the briefs of the parties.

Nor was there an abuse of its discretion by ruling on defendant's motion for a new trial without an evidentiary hearing, see United States v. Nace, 561 F.2d 763, 772 (9th Cir. 1977), or by denying that motion on the ground, among others, that defendant's evidence was not newly discovered. See United States v. Sarno, 73 F.3d 1470, 1507 (9th Cir. 1995).

There was no clear error in finding that defendant's conspiracy lasted until after November 2001; therefore, applying the 2001 edition of the Sentencing Guidelines did not violate the Ex Post Facto Clause, see United States v. Inafuku, 938 F.2d 972, 973-74 (9th Cir. 1991). Nor was there error in finding that defendant's fraud violated an SEC injunction. See U.S.S.G. §2B1.1(b)(7)(C)(2001); id. note 5(C). Defendant, in fact, admitted she had notice of the injunction.

In calculating the Guidelines range, the court properly considered losses not proven at trial, see 18 U.S.C. §3661, and those caused by defendant's conspirators, see U.S.S.G. §1B1.3(a)(1)(B) (2001). Nor did any abuse of discretion occur by enhancing her sentence on this basis. Enhancement of

defendant's sentence was appropriate given her sophisticated means, including numerous fraudulent press releases, a corporate shell, a reverse merger and bank accounts in the names of others. See id, §2B1.1(b)(8)(C).

Finally, it was within the court's discretion to resolve all these issues without an evidentiary hearing. See United States v. Houston, 217 F.3d 1204, 1209 (9th Cir. 2000). Defendant's claim she was entitled to an evidentiary hearing on her "diminished capacity" and "other factors" bearing on her sentence fails because she never asked for such a hearing and cannot now show that the failure to provide on was plain error.

AFFIRMED.

2.

Order denying Appellant's Petition for Rehearing, filed May 23, 2008.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ORDER
	)	
DIANA LEE FLAHERTY,	)	
	)	
Defendant-Appellant.	)	
	)	

NO. 07-10138

D.C. No. CR-04-00084-RCJ/RJJ
District of Nevada, Las Vegas

Before: HAWKINS, BERZON, and BYBEE, Circuit Judges.

Appellant's Petition for Rehearing has been considered and is DENIED.

FILED
MAY 23 2008
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS